# I. ARTICLES

## THE DECISION OF THE HUNGARIAN CONSTITUTION COURT ON CONSTITUTIONAL IDENTITY [Decision 22/2016. (XII. 5.) CC][*]

**Zoltán POZSÁR-SZENTMIKLÓSY**[**]
**Veronika KÉRI**[***]

**Abstract**

*In Decision 22/2016. (XII. 5.) CC the Hungarian Constitutional Court introduced in the "vocabulary" of Hungarian Constitutional Law the concept of constitutional identity. The case was based on the request of the ombudsperson for abstract interpretation of the provisions of the Fundamental Law related to the implementation of EU Law, namely an EUC decision on the resettlement of asylum-seekers. While the Constitutional Court did not answer the question of the ombudsperson, it has expressed its position on ultra vires acts of the European Union in general terms. According to the Court, sovereignty of the state, protection of fundamental rights and constitutional identity can pose limits against the implementation of EU Law. Since then, the Seventh Amendment to the Fundamental Law (2018) included these requirements into the text of the constitution. The article offers a detailed overview and a critical analysis of the Decision of the Constitutional Court*

**Keywords:** *constitutional identity, protection of sovereignty, fundamental rights reservation, ultra vires acts, constitutional dialogue, constitutional interpretation*

**Résumé**

*Dans la Décision* n° *22/2016. (XII. 5.) CC la Cour constitutionnelle hongroise a introduit dans le „vocabulaire" du droit constitutionnel hongrois le concept*

[*] The original version of this analysis was published in Hungarian in the journal *Jogesetek Magyarázata*, 2017/1-2. The English version has been translated by Anikó Träger, doctoral student, ELTE Eötvös Loránd University (Budapest).

[**] Assistant professor (PhD), ELTE Eötvös Loránd University (Budapest).

[***] Doctoral student, ELTE Eötvös Loránd University (Budapest).

*d'identité constitutionnelle. L'affaire a été initiée par une requête de l'ombudsperson sur l'interprétation abstraite des dispositions de la loi fondamentale relatives à l'application du droit de l'Union Européenne, plus précisément d'une Décision du Conseil de l'UE sur la relocation des demandeurs d'asyle. Tandis que la Cour constitutionnelle n'a pas répondu à la question adressée par l'ombudsperson, elle a exprimé sa position sur les actes ultra vires de l'Union Européenne dans des termes généraux. Selon la Cour, la souveraineté de l'Etat, la protection des droits fondamentaux et l'identité constitutionnelle peuvent mettre des limites à l'application du droit européen. Depuis la décision de la Cour, le Septième Amendment à la loi fondamentale (2018) a incorporées ces exigences dans la Constitution. Le présent article offre un regard détaillé et une analyse critique de la décision de la Cour constitutionnelle*

**Mots-clés:** *identité constitutionnelle, protection de la souveraineté, réserve des droits fondamentaux, actes ultra vires, dialogue constitutionnel, interprétation constitutionnelle*

## 1. The Petition

The Council Decision (EUC) 2015/1601 of 22 September 2015 (hereinafter: EUC Decision) established provisional measures in the area of international protection of asylum-seekers for the benefit of Italy and Greece. The EUC Decision prescribed the relocation of asylum-seekers from the abovementioned countries to other Member States. In the case of Hungary, the EUC Decision ordered the relocation of 1294 persons. According to the standpoint of the Commissioner for fundamental rights in Hungary (the ombudsperson) the process of the EUC Decision disregards the comprehensive examination of the individual circumstances of the applicants, is collective in nature and differs from the usual approach to fundamental rights protection mechanisms in the European Union. The ombudsperson (hereinafter: Petitioner) requested the abstract interpretation of certain provisions of the Fundamental Law of Hungary regard with the EUC Decision.

The Petitioner filed his request on the examination of the Article XIV para. (1) and (2)[1] and Article E) para. (2)[2] of the Fundamental Law based on the

[1] Article XIV.

Section 38 para. (1) of the Act CLI of 2011 on the Constitutional Court (hereinafter: the ACC). The questions and argumentation of the Petitioner were the following:

(I.) Does the unconditional prohibition on the collective expulsion of foreigners, regulated in Article XIV (1) of the Fundamental Law, apply to the instrumental acts performed by the bodies or institutions of the Hungarian State as necessary for the implementation of an unlawful collective expulsion executed by another Member State, or only to those cases when foreigners must leave the territory of Hungary based on the decision of the Hungarian authorities? In this regard the Petitioner referred to the recommendations of international organizations and courts as well as provisions of international conventions which prescribe the prohibition of collective expulsion and the right to residence of the asylum-seekers until the final decision in their individual case. According to the Petitioner, the EUC Decision stands against the Dublin III. Regulation based on the individual selections of the applicants and the approval of the receiver state. According to the argumentation of the Petitioner, for executing the relocation from a Member State, the reception in another Member State is a necessary instrumental action. Therefore, if one state assists the unlawful act of the other, both states will be responsible for that procedure.

The second question about the interpretation of Article E) para. (2) contains three parts:

a. Are the state organs of Hungary, in accordance with Article E) para. (2) of the Fundamental Law, entitled or obliged to implement measures adopted in the framework of the inter-State cooperation achieved in the

---

(1) Hungarian nationals shall not be expelled from the territory of Hungary and may return from abroad at any time. Foreigners residing in the territory of Hungary may only be expelled under a lawful decision. Collective expulsion shall be prohibited.
(2) No one shall be expelled or extradited to a State where there is a risk that he or she would be sentenced to death, tortured or subjected to other inhuman treatment or punishment.

[2] Article E)
(2) With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences arising from the Fundamental Law jointly with other Member States, through the institutions of the European Union.

European Union if such measures are against the provisions of the Fundamental Law on fundamental rights? If it is possible to infer from the provisions of the Fundamental Law that Hungarian state organs are not entitled or obliged to implement such measures, then which Hungarian institution may declare that in a particular case?

b. The second subquestion relates to the *"ultra vires"* acts of the European Union, those acts which are not based on a competence transferred by Hungary to the European Union on the basis of the Founding Treaties concluded with the other Member States. Is it possible to deduct from the provisions of the Fundamental Law that the Hungarian state organs are not entitled or obliged to implement such measures? If yes, which Hungarian institution may declare that fact?

c. Can the provisions of Article E) and Article XIV of the Fundamental Law on the prohibition of collective expulsion be interpreted in a way of limiting Hungarian state organs in executing the provisions of the EUC decision?

## 2. The Reasoning of the Constitutional Court's Decision

### *A. The Majority Opinion*

The Constitutional Court (hereinafter: CC) emphasized that the petition originates from the person entitled to file a motion and the request relates to a concrete provision of the Fundamental Law (hereinafter: FL). Moreover, the petition fits the requirements related to abstract constitutional interpretation as one of the competences of the CC: it concerns a concrete constitutional dispute and the interpretation can be directly deduced from the FL. The first question of the petitioner (on the interpretation of Article XIV) was separated by the CC from the question on the interpretation of Article E) - the reasoning focuses on the latter.

Regarding the interpretation of Article E), the CC declared that the first and the second subquestions of the question are related to a concrete constitutional dispute which is in direct connection with the FL. However, the third subquestion can only be addressed by the CC in certain respects. According to the standpoint of the CC, the third subquestion can only be interpreted in the light of the first two problems, i.e. the context of fundamental rights reservation and the *ultra vires* acts, as this is the only

level of abstraction satisfying the condition of concreteness under Article 38 (1) of ACC. With due regard to the above, the CC shall explain its response to the third subquestion included in its response to the first two.

The CC declared that it is aware of the fact that, from the point of view of the Court of Justice of the European Union, the EU law is defined as an independent and autonomous legal order. However, the European Union is a legal community, and the core basis of this community are the international treaties concluded by the Member States. The CC quotes the decision of the Bundesverfassungsgericht[3] supporting the above statement. This decision declared that, as the contracting parties are the Member States, it is their national enforcement acts that ultimately determine the extent of primacy to be enjoyed by EU law against the relevant Member State's law.

Furthermore, as the CC considers the constitutional dialogue within the European Union to be of primary importance it examined the positions taken by the Member States concerning *ultra vires* acts and the reservation of fundamental rights.

According to the Supreme Court of Estonia, if it becomes evident that the new founding treaty of the European Union or the amendment to a founding treaty gives rise to a more extensive delegation of competence of Estonia to the European Union it is necessary to seek the approval of the holder of supreme (state) power.[4]

According to the decision of the French Constitutional Council, the transposition of a Directive cannot run counter to a rule or principle inherent to the constitutional identity of France.[5]

The Supreme Court of Ireland explained that without further amendment to the Constitution, any amendment to the Treaties shall be considered too broad.[6]

The Constitutional Court of Latvia declared clearly that delegation of competences cannot counter the rule of law and the basic principle of an

[3] BVerfGE 75, 223 [242].
[4] Riigikohus, 12 July 2012, 3-4-1-6-12, 128, 223.
[5] Conseil Constitutionnel, N° 2006-540 DC.
[6] Crotty v. An Taoiseach case (9 April 1987).

independent, sovereign and democratic republic based on the fundamental rights.[7]

The Constitutional Court of Hungary examined several decisions of the Constitutional Tribunal of Poland. As established in one of these decisions, the accession of Poland to the European Union did not undermine the supremacy of the Constitution over the whole legal order within the field of sovereignty of the Republic of Poland.[8] The primacy of the norms of EU regulations takes place in the event of their unconformity with statutes. By contrast, the Constitution retains its superiority and primacy over all legal acts which are in force in the Polish constitutional order, including the acts of EU law.[9] Due to the status of the Constitution as the supreme law of the Republic of Poland, it is possible to examine whether the norms of EU regulations are consistent therewith.[10]

As laid down by the Spanish Constitutional Court, the transfer of the exercise of competences to the European Union and the consequent integration of Community legislation in the Spanish legal system imposes unavoidable limits on the sovereign power of the State. This is acceptable only when European legislation is compatible with the fundamental principles of the social and democratic state and the rule of law, prescribed by the national Constitution. These substantive limits shall also be taken into consideration in the case of sovereignty-transfer defined in the Constitution.[11]

Regarding the doctrine of primacy of the EU Law, the Constitutional Court of the Czech Republic established that its jurisdiction is restricted to a certain extent.[12] In another decision, the Constitutional Court of the Czech Republic held that the transfer of powers to the organs of the European Union is valid till is in accordance with foundations of state sovereignty, including essential content.[13]

In accordance with the requirement of constitutional dialogue between the Member States, in one of its decisions the Supreme Court of the United

[7] Satversmes tiesa, 7 April 2009, 2008-35-01, 17.
[8] 11 May 2005, K 18/04.
[9] 11 May 2005, K 18/04.
[10] Case Nº SK 45/09 of 16 November 2011.
[11] Case Nº DTC 1/2004 of 13 December 2004.
[12] Case Nº Pl US 50/04 of 8 March 2006.
[13] Case Nº ÚS 19/08 of 26 November 2008.

Kingdom made a reference to a decision of the German Federal Constitutional Court. According to this, as part of a cooperative relationship between the Federal Constitutional Court and the European Court of Justice, the decision in question must not be read in a way which cannot question the identity of the Basic Law's constitutional order."[14]

The German Federal Constitutional Court explained in its decision on the Treaty of Lisbon that it always examines whether legal acts and instruments of the European institutions are within the boundaries of the sovereign powers accorded to them by way of conferral, whilst adhering to the principle of subsidiarity under Community and Union law. Furthermore, the Federal Constitutional Court examines whether the inviolable core content of the constitutional identity of the Basic Law is respected by way of these acts of the Union.[15]

Based on the review of the case law of the Member States' supreme courts performing the tasks of constitutional courts and of the Member States' constitutional courts, the Constitutional Court established that within its own scope of competences, on the basis of a relevant petition, in exceptional cases and as a resort of *ultima ratio*, i.e. along with paying respect to the constitutional dialogue between the Member States, it can examine (a) whether exercising competences on the basis of Article E) para. (2) of the Fundamental Law results in the violation of human dignity or the essential content of any other fundamental right, (b) the sovereignty of Hungary and (c) the constitutional self-identity of Hungary.

Regarding the reservation of fundamental rights, the Constitutional Court declared that any exercise of public authority in the territory of Hungary is linked to the fundamental rights: as the protection of fundamental rights is a primary obligation of the State, this shall precede the enforcement of any other state interest. As demonstrated in the opinion of the German Constitutional Court, detailed in the so called 'Solange-decisions', due to the institutional reforms, the Charter of Fundamental Rights and the Court of Justice of the European Union in most cases can grant the same level of protection for fundamental rights as the level secured by the national constitutions. However, the CC cannot set aside the *ultima ratio* protection of human dignity and the essential content of fundamental rights.

---

[14] State v. Secretary of State for Transport, 22 January 2014.

[15] BverfG, 2 BvE 2/08 of 30 June 2009.

As regards the petitioner's motion related to transgressing the scope of competences, the CC notes that when the *ultra vires* nature of an act under EU law occurs, the Government, representing Hungary in the Council empowered to adopt legislation in the Union, may take the available steps.[16] Furthermore, the National Assembly of Hungary or the Government of Hungary may file a claim with the Court of Justice of the European Union alleging the violation of the principle of subsidiarity by the legislative act of the European Union. In the following, the CC explicates that the joint exercise of competences, nevertheless, is not unlimited, as Article E) para. (2) of the Fundamental Law not only grants the validity of EU law in respect of Hungary, but at the same time it imposes limitations on the transferred and jointly exercised competences. On the one hand the joint exercise of a competence shall not violate Hungary's sovereignty (sovereignty control), and on the other hand it shall not lead to the violation of constitutional identity (identity control). Respecting and safeguarding the sovereignty of Hungary and its constitutional identity is an obligation of the National Assembly contributing to the European Union's decision-making mechanism and of the Government directly participating in that mechanism. However, according to Article 24 para (1) of the Fundamental Law, the main organ responsible for such protection is the Constitutional Court. The CC emphasizes that the direct subject of sovereignty- and identity control is not the legal act of the Union or its interpretation, therefore the Court shall not comment on the validity, invalidity or the primacy of application of such Union acts.

As regards sovereignty control, the CC notes that it is based on Article B) of the Fundamental Law. According to the abovementioned article, in Hungary, the source of public power shall be the people, and power shall be exercised by the people through elected representatives or, in exceptional cases, directly. As long as Article B) of the Fundamental Law contains the principle of independent and sovereign statehood and indicates the people as the source of public power, these provisions shall not be emptied out by the Union-clause in Article E). Moreover, the CC

[16] Based on Article 6 of the Protocol that forms an integral part of the Founding Treaties the National Assembly, and – in accordance with Article 16 para. (2) of TEU – the Government.

declares the principle of *'maintained sovereignty.'*[17] Sovereignty has been laid down in the Fundamental Law as the ultimate source of competences and not as a competence. Therefore, the joint exercising of competences shall not result in depriving the people of the possibility of possessing the ultimate chance to control the exercise of public power.

On the identity control, the CC notes the following: according to Article 4 (2) TEU,[18] the protection of constitutional identity should be granted in the framework of an informal cooperation with EUC based on the principles of equality and collegiality with mutual respect to each other. The Constitutional Court of Hungary interprets the concept of constitutional identity as part of Hungary's self-identity based on the overall Fundamental Law and certain provisions thereof, in accordance with the National Avowal and the achievements of the country's historical constitution – as required by Article R) para. (3) of the Fundamental Law. The constitutional self-identity of Hungary is not a list of static and closed values, nevertheless many of its important components – identical with the constitutional values generally accepted – can be highlighted as examples: fundamental freedoms, the division of powers, republic as the form of government, respect of autonomies under public law, the freedom of religion, legally bound public power, parliamentarianism, the equality of rights, acknowledging judicial power, the protection of the national minorities. Moreover, achievements of the historical constitution can be mentioned, which the Fundamental Law and thus the whole Hungarian legal system are based upon. Furthermore, the Constitutional Court declares that the protection of constitutional self-identity may be raised in cases having an influence on the living conditions of the individuals, especially their privacy protected by fundamental rights, on their personal and social security, and on their decision-making responsibility, as well as when Hungary's linguistic, historical and cultural traditions are affected. The Constitutional Court declares that the constitutional self-identity of

[17] As by joining the European Union, Hungary has not surrendered its sovereignty, it rather allowed for the joint exercise of certain competences, the maintenance of Hungary's sovereignty shall be presumed when examining the joint exercise of further competences, additional to the rights and obligations provided in the Founding Treaties of the European Union. See: Decision 22/2016 (XII. 5.) CC [60].

[18] The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.

Hungary is a fundamental value acknowledged but not created by the Fundamental Law. Consequently, constitutional identity cannot be waived by way of an international treaty – Hungary can only be deprived of its constitutional identity through the final termination of its sovereignty. Therefore, the protection of constitutional identity shall remain the duty of the Constitutional Court until such time as Hungary is a sovereign State. Accordingly, sovereignty and constitutional identity have several common points thus their control shall be performed with due regard to each other in specific cases.

On the Petitioner's question related to the implementation of the EUC Decision by the Hungarian state organs the CC gives an abstract answer. If human dignity, another fundamental right, the sovereignty of Hungary (including the extent of the transferred competences) or its self-identity based on its historical constitution can be presumed to be violated due to the exercise of competences based on Article E) para. (2) of the Fundamental Law, the CC may examine based on a relevant petition, in the course of exercising its competences, the existence of the alleged violation.

### *B. Concurring Opinions and Dissenting Opinions*

Egon Dienes-Oehm agrees with the CC with regard to the assessments expressed in the decision related to the joint exercise of competences and declaring the general designation of its review competence. However, according to his standpoint, the reasoning does not give an exhaustive list of the limitations in concrete cases of the review competence, which is therefore specified in general terms, allowing for several potential interpretations in this respect. In his concurring opinion he gives a summary of the limitations originating from the Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU), the Fundamental Law and the Act CLI of 2011 on the Constitutional Court (ACC).

First, he points out that the petition aimed at establishing the *ultra vires* nature of the Union's legal act can only result in an obligation of review by the Constitutional Court with temporal limitations. Furthermore, he notes that any legal debate after the adoption of a piece of EU legislation falls exclusively into the scope of competence of the Court of Justice of the European Union (CJEU) in accordance with Article 344 of TFEU. It is a question to be addressed independently, what are the conditions upon

which the Member States' constitutional courts or supreme courts can still play a role in preventing the transgressing of competences. In his opinion, the CC shall not review the judicial acts of the Union either.

Furthermore, he declares that as the sources of EU law directly enforceable in the Member States without any legislative measure taken by the Member States are not "legal regulations" according to the Fundamental Law[19] and the ACC.[20] These cannot form the subject matter of preliminary or posterior review, and the same applies to constitutional complaints as well. Consequently, he holds that the possibility of reviewing EU legislation of *ultra vires* nature can only be based upon Section 38 (1) of ACC (abstract interpretation of the provisions of the Fundamental Law).

He accepts the principle of maintained sovereignty with the interpretation that it can be regarded as a procedural requirement providing guidance for the Constitutional Court's future activity in the field of sovereignty-control. It can play a role during the constitutional review in the case of transferring new (further) competences for joint exercise. He also notes that the cases where this requirement is applicable can be only exceptional situations. He refers as examples to the development of EU law regulations in the field of expected future policies related to border control, asylum and immigration.

According to the standpoint of Imre Juhász, separating the petitioner's claim on interpreting Article XIV of the Fundamental Law is questionable especially in the light of the fact that the EUC Decision is applicable to the persons who arrive(d) to the territory of Italy or Greece between 25 September 2015 and 26 September 2017, as well as to those applicants who have arrived to the territory of the Member States since 24 March 2015.

In his opinion, the level of protection of fundamental rights as secured by the law of the European Union should have been analyzed more deeply, on the basis of Hungarian constitutionality. He holds that the fundamental rights' protection level of the European Union cannot be specified in an exact way, and the present state of fundamental rights' protection is not without debates and it rises questions that are yet unanswered. According to the standpoint of Mr. Juhász, the force of the Beneš-decrees based on the principle of collective guilt, the application of a 'double standard' in

[19] Article 24 para. (2) of the Fundamental Law.
[20] Sections 23–31 of ACC.

fundamental rights disputes in the case of states which became Member States earlier and the ones which joined the Union later are obvious examples for the issue detailed above. Therefore, his conclusion is that making any, not adequately matured statement about presuming the sufficient ("at least adequate") level of fundamental rights' is misleading.

In his concurring opinion, Béla Pokol emphasizes that the CC in its decision missed a more elaborate consideration of the experiences gained by the European constitutional courts. According to him, the essential problem is that the domestic actions of protecting sovereignty and constitutional identity by the constitutional courts against the legal acts of the Union have been institutionalized in each country in two phases: establishing in the country concerned the mechanism of taking action as an abstract possibility is separated from the decision on declaring the prohibition of application against the concrete act of the Union. Furthermore, the rejection of the application of a legal act of the Union can cause diplomatic consequences which are out of the competence of the CC.

This is the reason why he stresses that the Government shall have the exclusive right to turn to the CC. This way, the commencement of the CC's procedure would always be preceded by the preliminary examination of an appropriate foreign policy expert staff, relieving the judges of the CC of the burden of considering the potential disadvantages that may affect the country because of their decision.

According to the concurring opinion of István Stumpf, the CC is an authentic interpreter of the Fundamental Law. Consequently, the CC can review and declare the unconstitutionality of the *ultra vires* acts in the context of the independent and democratic State under the rule of law [Article B) para (1) of the Fundamental Law] and the exercise of competences transferred to the European Union [Article E) para. (2) of the Fundamental Law] ("integration reservation").

According to the standpoint of Mr. Stumpf, the CC made an evident decision regarding its competence. Article E) para. (2) of the Fundamental Law settles the joint exercise of powers jointly with other Member States, therefore those legal acts which are enacted based on the authorization of the Fundamental Law, cannot be contrary to the Fundamental Law itself. At the same time, Article E) para. (2) of the Fundamental Law does not contain any provisions on the nature of EU law, its relation to the legal

system of Hungary, its force and its application, consequently, it does not qualify as an integration clause of European law.

According to the holdings of the decision "the CC may examine upon a relevant motion – in the course of exercising its competences – whether the joint exercise of powers under Article E) para. (2) of the Fundamental Law would violate" the Fundamental Law. Looking at the competences of the CC specified in Article 24 para. (2) of the Fundamental Law, one may find that the legislator defined clearly the subject of review regarding each procedure of the CC: legal regulation or judicial decision. According to the relevant provisions of ACC, all types of constitutional complaints can only be submitted in the case of the violation of a right granted in the Fundamental Law; abstract constitutional values, such as the 'sovereignty of Hungary' or its 'identity based on the country's historical constitution' cannot form the basis of a petition. In his opinion, the CC can perform the protection of Hungary's sovereignty and constitutional identity when – for example at the time of amending a Founding Treaty – the empowered bodies of the Hungarian State request a review about the competence transfer to the bodies of the Union, whether it could be in conformity with the Fundamental Law.

He also declares that the CC - contrary to its expressed intention – implicitly examines the validity of European Law by declaring their *ultra vires* nature.

According to the relevant part of the majority decision on sovereignty control (Reasoning [58]–[60]), 'the joint exercise of competences shall not result in depriving the people of the possibility of possessing the ultimate chance to control the exercise of public power (realized either in joint or in individual – Member State – form)'. Mr. Stumpf doubts the accuracy of this statement as in certain cases – taking the national referendum as an example – it is the Fundamental Law itself which limits the possibility of the people to control the activity of public institutions. Similarly, the statement of the majority decision could hardly mean that in individual cases voters could review the measures taken by the bodies of the European Union. He also considers the following statement of the majority decision unacceptable: 'The protection of constitutional self-identity may be raised in the cases having an influence on the living conditions of the individuals, in particular their privacy protected by fundamental rights, on their personal and social security, and on their decision-making

responsibility'. This statement has been taken without proper examination of the circumstances from the decision of the German Federal Constitutional Court,[21] quoted earlier in the reasoning, in the absence of any argument based on the Fundamental Law of Hungary. He also stands against the approach that would tear apart the notion of Hungary's constitutional identity from the text of the Fundamental Law, creating a kind of 'invisible Fundamental Law' to be protected by the CC.

András Varga Zs. highlights in his concurring opinion refers to the notion of constitutional identity prescribed in the majority opinion ass an immutable constitutional value. According to his standpoint, the value of the constitutional self-identity is not a universal legal value, rather a set of peculiarities of the nations and the communities belonging to the nations. In the case of Hungary, the values which constitute this self-identity are results of the achievements of the historical constitution, therefore it is not possible to ignore them.

Regarding the European Union, one may conclude that Hungary's constitutional self-identity had existed even before the country's accession to the Union as a Member State. Accordingly, the Constitutional Court should interpret strictly the presumption of the 'maintenance of sovereignty'. If there are arguments in favor of keeping the exercise of a competence within the sovereignty of the Member country, then it should be presumed that Hungary has not transferred the competence to the European Union, even when there are other arguments in favor of such transfer.

László Salamon holds that the majority decision of the CC is unsatisfactory and fails to provide a complete answer to the questions aimed at the interpretation of the Constitution, as asked by the commissioner for fundamental rights. The question of the petitioner was aimed at finding out whether the bodies and the institutions of the State of Hungary are entitled or obliged to implement measures adopted in a competence exercised jointly with the other Member States of the European Union if such measures are against the provisions of the Fundamental Law of Hungary regarding the contents of fundamental rights. He holds that violating the provisions of the Fundamental Law on fundamental rights is prohibited - an essential part of the possible answer to the above question of the petitioner.

[21] BverfG, 2 BvE 2/08, 30 June 2009.

Another question of the petitioner was substantially aimed at finding out whether the enforcement of the Union legal act is affected by the fact of being adopted in the absence of competence, i.e. *ultra vires*. He notes that the CC should have given a more detailed interpretation regarding this question emphasizing that the competence to stand against the enforcement of the *ultra vires* legal acts shall have been declared not only in the case of the CC, rather in the case of other state organs as well.

Finally, the dissenting judge declares that the procedures to be followed by state organs, as well as their attitude towards the situations mentioned above cannot be linked to a preliminary procedure of the CC. For that matter, this is neither expressly stated, nor contested by the decision itself.

## 3. The Decision and the *Ratio Decidendi*

The Constitutional Court declared that it can examine whether the joint exercise of competence based on the Article E) para. (2) violates a) the human dignity or another fundamental rights, b) the sovereignty of Hungary or c) the self-identity of Hungary based on its historical constitution.

## 4. The Criticism of the Reasoning

The Constitutional Court refers to the requirements of the abstract interpretation of the Fundamental Law, namely, having a concrete constitutional issue and the interpretation to be directly deduced from the Fundamental Law. However, the CC does not make a detailed interpretation of the abovementioned requirements. The reasoning of the decision contains only one statement, noting that these questions are clearly considered as constitutional issues.[22] The method of the analysis should have been also clarified based on the Decision 17/2013. (VI. 26.) CC[23]: "Based on this competence [abstract interpretation of the Fundamental Law] only concrete questions are acceptable which can be answered based only on constitutional reasoning and the interpretation of

[22] Decision 22/2016. (XII. 5.) CC [31].

[23] This decision underlines that "the role of abstract interpretation of the provisions of the Fundamental Law does not differ from the particularities of the same competence based on the former constitution." See: Decision: 17/2013. (VI. 26.) CC [7].

the Fundamental Law left out any other law."[24] If the abovementioned methodological requirements were declared and applied specifically to this case, we should get a more precise point of reference for the analysis of the Constitutional Court's reasoning.

It should also be underlined that the CC did not offer a detailed reasoning for separating the question on the interpretation of Article XIV of the Fundamental Law (the constitutional prohibition of the expulsion) from the other questions. The reasoning contains only a simple explanation that the separated interpretation is reasonable.[25] Referring to the reasonableness, the Court said that it is in conformity with the provisions of the ACC.[26] However, it would be useful to know the substantive reasons related to the separated interpretation. In this regard, one constitutional and one political reason can be recalled. A relevant constitutional consideration could be that the CC wanted to specifically emphasize its statements regarding fundamental rights reservation, sovereignty control and identity control. The political – and therefore not explicit - reason can be that the CC did not wish to deal with the constitutional context of the applicability of the 2015/1601 EUC Decision resolution that served as a basis for the questionable[27] and invalid "quota referendum" and ultimately the unsuccessful submission of the amendment to the Fundamental Law.

According to the CC, the third question regarding Article E) (on the applicability of the unconditional prohibition of the collective expulsion of foreigners' in the case of the planned relocation of asylum-seekers, based on the EUC decision) can be answered only in certain aspects. The matters of fundamental rights reservation, sovereignty control and identity control – based on the further statements of the reasoning – are not defined by the subject of the case, rather shall be answered on a more general level. This is the primary approach of the CC taken in the decision.

The CC recalls two relevant and opposing views regarding the question on the enforcement of the EU law. According to the standpoint of the CJEU,

---

[24] Decision 17/2013. (VI. 26.) CC [11].

[25] Decision 22/2016. (XII. 5.) AB [29].

[26] See: Article 58 (3) of ACC.

[27] About the critical approach see: Zoltán Pozsár-Szentmiklósy, *A Kúria végzése a betelepítési kvótáról szóló népszavazási kérdésről. Országgyűlési hatáskör az európai jog homályában* [The Decision of the Curia on the national referendum on refugee quotas.. Competence of the National Assembly in the Gloom the EU Law.], in (2016) 1-2 *Jogesetek Magyarázata,* p. 77-84.

the EU legislation is an independent, autonomous legal system which has priority over national legal systems. However, the community of the European Union is finally based on the treaties concluded by the Member States. Therefore, these treaties necessarily restrict the enforcement of the EU law. One can add that the reasoning of the CC is somewhat misleading regarding the second approach stating formally that the Member States are "the rulers of the treaties". It is a more relevant question is in this regard that the substance of international treaties concluded between the Member States and the rules of the constitutions indicate the room of manoeuvre for the EU as a community of law.

It is remarkable that the CC – responsively on the approaches of transnational courts and academic works – refers to the concept of the constitutional dialogue when it reviews the standpoints of the Member States regarding *ultra vires* acts and fundamental right reservation. However, the only result of this research and detailed presentation of diverse sources is an unsought monologue: the CC only presents the relevant practice of the foreign courts. The in-depth analysis of the presented approaches, and the application of these in Hungarian context are missing. Consequently, "the interaction of constitutional organs of equal position" is missing from the conceptual elements of the constitutional dialogue which could otherwise support "the identification of the most accurate constitutional content."[28] One can add that the detailed presentation of the practice of Member States can only have an additional function because it cannot support the substantive reasoning. This is regrettable because this case gave a unique possibility for the CC to take part substantively in the European constitutional dialogue.

The lack of discussion is even more obvious when the CC makes its statements after the overview of the practices of other Member States and the CJEU. The statements of the decision are supplemented with the *ultima ratio* argument and the respect for the constitutional discussion between Member States. On the other hand, the explanation is completely missing regarding the measure to which the practices of Member States support or confute the possibility of fundamental rights reservation, sovereignty protection and identity protection, or even the *ultima ratio* argument. The

[28] See: Tímea Drinóczi, *Jogrendszerek versenye és alkotmányos párbeszéd* [The Competition of Legal Systems and the Constitutional Dialogue], in (2016) 2 *Iustum Aequum Salutare*, pp. 213-233. 216.

reader may have a sense of lacking in the sense, that although the previously examined questions were dealing with two concepts (fundamental rights reservations and *ultra vires* legal acts), in the conclusion the concepts of sovereignty and identity also appear. According to the latter, more detailed reasons are included in other parts of the decision.

The statement of the CC on the fundamental rights reservation could be the easiest reasoning task – a possible reason why the related, relatively short part of the reasoning does not contain any special effort. The most important statement of the CC is a constitutional axiom which declares that that any exercise of public authority on the territory of Hungary (including the joint exercise of competences with other Member States) is bound by fundamental rights. This statement can be supported by a historical overview, confirmed by theory and prevailing in practice, namely the classic concept of the fundamental rights, according to which fundamental rights protect the autonomy of the individual against the public authority. The CC did not express the abovementioned correlation, rather only interpreted a single norm of the Fundamental Law of Hungary, Article I para. (1) which declares that the protection of the fundamental rights is the primary obligation of the State. The "primary obligation" is the point of view which leads the CC to the statement that the protection of fundamental rights overtakes other obligations of the state including the obligation based on the membership in the European Union.

It's understandable that the CC did not base its reasoning on a detailed exposition of conceptual features of fundamental rights, but on the text of the Fundamental Law. This way the CC was not forced to take a stance in the multifarious debate on the priority of fundamental rights against the majoritarian decisions based on democratic representation.[29] No doubt,

[29] Bruce Ackerman created an easily applicable typology in this context: the Author makes a difference between the theory that argues for the normative priority of fundamental rights, the monistic perception of the democracy that highlights the role of majority decisions based on a democratic procedure and the dualistic model of democracy. The essential feature of the latter theory is the distinction between two levels of the community decisions: in the "normal mode" of politics the majority decision has priority, while in "the exceptional moments of the constitutional politics" it is necessary to gain the support of the vast majority of the community (among them the minority). See: Tamás Győrfi, *A többségi döntés tartalmi korlátai és az alkotmánybíráskodás* [The limits of the majority decision and constitutional adjudication], in A. Jakab, A. Körösényi, *Alkotmányozás Magyarországon és*

from the concept of "primary obligation" it is possible to reach to the conclusion on the priority status of fundamental rights, which is accordingly interpretable within the structure of hierarchy of norms[30] as well. However, a more convincing argumentation can be formed based on the provision of Article I para. (3) of the Fundamental Law, which defines the rules related to the possible limitations of fundamental rights, stating the protection of the essential (core) content of these. From provision[31] follows in a compelling way that the essential content of fundamental rights enjoys a comprehensive protection against all acts of public authorities (including the legislation of Hungarian constitutional organs, legislation by the way of the EU community of law, and the implementation of these legislations).

From the substantive point of view, the CC basically relies on the decisions of the Bundesverfassungsgericht[32] when declaring that the Hungarian Constitutional Court has a reviewing competence on the law of the European Union, considering at the same time the enforcement of the EU law. The most important and independent statement of the CC is when it declares that "the state cannot set aside the *ultima ratio* protection of human dignity and the essential content of fundamental rights".[33] However, the CC did not support the abovementioned statement with substantive arguments, it just declared it. According to our standpoint, the conclusion is correct, but the detailed reasoning could strengthen the normative power of this statement. It would be enough to demonstrate that the human dignity is conceptually unrestrictable as a legal status which protects the

---

*máshol. Politikatudományi és alkotmányjogi megközelítések* [Constitution-making in Hungary and elsewhere. Approaches of Political Science and Constitutional Law] (Budapest: MTA TK Politikatudományi Intézet – Új Mandátum Kiadó, 2012), pp 33-57.

[30] For the possible meaning of the concept see: László Sólyom, *Normahierarchia az Alkotmányban* [Hierarchy of Norms in the Constitution], in (2014) 1 *Közjogi Szemle,* pp. 1-7.

[31] Taking into consideration the abstractness of the notions and their connections with other rules of Constitutional Law, the systematic interpretation leads the easiest way to this conclusion. For this, there is a need for previous knowledge on the notions to interpret and also keeping in mind the integrity of the constitution. Regarding the interpretation methods see: Lóránt Csink, Johanna Fröchlich, *Egy alkotmány margójára. Alkotmányelméleti és értelmezési kérdések az Alaptörvényről* [To the margin of a constitution. Questions of constitutional theory and constitutional interpretation related to the Fundamental Law] (Budapest: Gondolat, 2012), pp. 73-75.

[32] Solange I, Solange II, 2 BvR 2735/14.

[33] Decision 22/2016. (XII. 5.) AB [49]

entire personality of the individual.[34] This statement is also true in the case of the essential (core) content of fundamental rights: the constituent power sets limits for the future restriction of those rights to ensure the protection of the immanent content of these.[35]

Consequently, recalling of the absolute protection of the fundamental rights is convincing. However, the reader easily may have a sense of lacking in the sense: the constitutional prohibitions based on human dignity[36] and the safeguards of constitutional criminal law[37] could be also mentioned in this regard. Emphasizing the *ultima ratio* nature can be a gesture for the priority clam of the EU law. However, the abovementioned statement does not have relevance in the case of absolute rights: public authorities have a constitutional obligation to protect these rights even if they do not act on an *ultima ratio* basis.

Regarding the *ultra vires* acts, the CC emphasizes that the National Assembly (based on Article 6 of the Protocol of the founding treaties) and the Government (based on the Article 16 of the EUT) can also take the necessary steps. Moreover, the reasoning mentions the opportunity to file a petition to the CJEU regarding the violation of subsidiarity by a legal act. The abovementioned reasoning also enforces the *ultima ratio* nature of the actions taken by the CC which– taking into consideration its previous practice – is by no means surprising. The reason behind the careful reasoning of the CC is that, while after the ratification of Lisbon Treaty most of the European countries tried to declare[38] the core of their existence as sovereign states that cannot be affected by the European integration, the

---

[34] The human dignity – jointly with the right to life – was graded as an "absolute value" by the Constitutional Court already in the decision 23/1990. (X. 31.) CC See: Decision 23/1990. (X. 31.) AB; ABH 1990. 88-114. 93.

[35] For the definition of the essential content of fundamental rights see: Zoltán Pozsár-Szentmiklósy, *Megismerhető-e az alapjogok lényeges tartalma?* [Is it possible to identify the essential content of fundamental rights?], in (2013) 12 *Magyar Jog,* pp. 714-722.

[36] See the prohibition of torture in Article III of the Fundamental Law.

[37] The picture can be more diverse when taking into consideration the theory of Gábor Halmai and Gábor Attila Tóth. In their perception, the safeguards of Criminal Constitutional Law acknowledged by the Constitutional Court are absolute rights which gained their status as a result of a balancing. See: Gábor Halmai, Gábor Attila Tóth, *Az emberi jogok korlátozása* [The limitation of human rights], in G. Halmai, G. Attila Tóth (Eds.): *Emberi jogok* [Human rights] (Budapest: Osiris, 2003), pp. 111-112.

[38] See summarized in "The Reasoning of the Decision" part the decisions cited by the Constitutional Court.

Constitutional Court of Hungary did not make any definite and clear decision regarding the abovementioned question. One can add that the CC previously dealt with more cases which affected its competence regarding the examination of the EU law.[39] Another reason for the emphasis on the *ultima ratio* nature is the sensitivity of the subject. The examination of the EU law by the constitutional courts of the Member States, a possible decision on the non-conformity of the EU norm with the national constitution and the declaration of its inapplicability would have unpredictable consequences regarding the legal enforcement and political dimension of the EU law. [40]

The statement of the CC that "respecting and safeguarding the sovereignty of Hungary and its constitutional identity is an obligation for everybody" refers to the organs of the European Union as well as the Hungarian public authorities. The notion of the protection against the integration is based on the national identity concept of Article 4 para. (2) of the TEU. However, regarding to the related obligations of the Government and the National Assembly, misses from the reasoning the reference to the textual basis of the Hungarian Fundamental Law. A statement affecting the national sovereignty to this degree, will definitely create a sense of lack in the absence of the proper constitutional basis. The insufficiency of the abovementioned statement can be reduced to some extent by the concurring opinion of András Varga Zs. who refers to the unchangeable values created by the historical evolution of the constitution. The protecting function of the constitutional self-identity will be concerned by this article in connection with the critics of the identity control.

The statement of the CC regarding *ultra vires* legal acts, declaring that the subjects of sovereignty or identity control are not directly made up by EU legal acts, therefore it will not make any decision in this regards, also raises questions. We do agree with István Stumpf's stance expressed in his concurring opinion, because the statements on the *ultra vires* acts as taken in the lack of competence - i.e. extended beyond the joint exercise of

[39] See Decision 17/2004 (V. 25.) CC, Decision 744/B/2004 CC and Decision 143/2010. (VII. 14.) CC.

[40] Regarding the connection models of the EU law and the law of the Member States see: László Blutman, Nóra Chronowski, *Az Alkotmánybíróság és a közösségi jog: alkotmányjogi paradoxon csapdájában (II.)* [The Constitutional Court and the EU Law: in the trap of a constitutional paradox], in (2007) 4 *Európai Jog*, pp. 14-28.

competence based on the Article E) para. (2) - immanently contains the declaration of the invalidity of the norm. One can add that without taking into consideration the EU source of law it is difficult to conduct sovereignty and identity control in specific cases. The external protection, that is the compliance to the limits to integration after setting these potential limits, can only be realized with the close inspection of EU legal acts. Therefore, this statement of the CC needs further explanation to achieve unambiguity. These criteria are also an implicit resolution with regards to the competence of the CC in examining EU law: instead of deciding this delicate question, it only hints at the majority stance, according to which the CC cannot declare a legal act of the EU invalid or inapplicable in Hungary. In any case, the phrasing leaves a lot of room to maneuver with further interpretations.

Regarding the sovereignty control, the essential statement of the CC is that the joint exercise of competence based on Article E) cannot empty Article B) of the Fundamental Law: the independent national sovereignty and popular sovereignty. The CC used in its reasoning the term of "sovereignty" without specifying it (national sovereignty or popular sovereignty). Later it solved the problem with the association of the two principles when declaring that the people shall not be deprived of the possibility of possessing the ultimate chance to control the exercise of public power.[41] Another doctrinal statement is the definition of the principle of "maintained sovereignty" According to the standpoint of the CC, the sovereignty is not a competence but it is defined as the final source of the competences. Consequently, the country can only transfer competences but not sovereignty to the European Union.[42] Along with the abovementioned statement, the principle of "maintained sovereignty" may seem contradictory because the denomination of the theory mentions the sovereignty and its maintenance against the transfer of competence in the reasoning. Consequently, the two concepts are not clearly separated. According to the related literature, it is also debated whether the final

[41] Tímea Drinóczi, *A 22/2016 (XII. 5.) AB határozat: mit (nem) tartalmaz, és mi következik belőle. Az identitásvizsgálat és az ultra vires közös hatáskörgyakorlás összehasonlító elemzésben.* [What contains and what does not the Decision 22/2016 (XII. 5.) CC? Analysis of the identity examination and the ultra vires joint exercise of competences in a comparative perspective], in (2017) 1 *MTA Law Working Papers,* p. 13.

[42] See András Varga Zs., *Végleges szuverenitás, vagy korlátozott hatáskör-transzfer?* [Final sovereignty or restricted transfer of competence?], in (2016) 1 *Fontes Iuris*.

decision, the ultimate source of power or the joint exercise of competence shall be taken into consideration. Moreover, if it is about the joint exercise of competences, it is a further challenge to identify the limits of these to be taken into consideration for the functioning international cooperation.[43]

According to the principle of maintained sovereignty there can be also criticized that it cannot give an appropriate answer to the question related to the further competences. Can the CC examine only the competences which are going to be transferred later or it can also examine the already transferred competences?[44] The *ultra vires* acts can be graded as legal acts which are extended beyond the rights declared in treaties. Consequently, these can be graded as "further joint exercise of competences" without any reasoning problems. In the light of the above, the sovereignty control cannot be used only in case of the future transfer of competences. Based on the reasoning and the majority opinion, at least according to our standpoint, the opposite can be stated.

The reasoning about the identity control starts with the reference to Article 4. para. (2) TEU which contains word for word the phrase of national identity not the constitutional identity. This reference itself can show that in the Hungarian constitutional system the theory of constitutional identity is can be linked to a content which is closer to national identity. The solution, that the CC bases its reasoning on the Article 4. para. (2) TEU and uses this reference to fix the borders against the integration on the basis national identity, can be also found in the practice of the other Member States' constitutional courts.[45] However, the majority opinion does not sufficiently explain the nature of the connection and possible differences between the concepts of national identity and constitutional identity. The further reasoning of the majority opinion also does not contain the complete definition of the constitutional identity, only the frames for the interpretation of the theory and specifies a few examples. Regarding the content of the notion, András Varga Zs. points out in his concurring

[43] Tímea Drinóczi, *A párbeszéd hatása az állami szuverenitásra* [The effect of the dialogue on national sovereignty], in (2014) 27 *MTA Law Working Papers*, p. 16.

[44] This statement is against of Egon Dienes-Oehm's concurring opinion that notes that he can accept the presumption of maintained sovereignty only in the case of examination of competences which are going to be transferred in the future.

[45] See summarized in "The Reasoning of the decision" part the decisions recalled by the Constitutional Court.

opinion that the constitutional self-identity is not the group of the universal rights, but it is a value which is specific for specified nations settled by a community and makes them different from the others. Justice Varga Zs. explains with the abovementioned statement the missing (but deducible from the EU context) thesis of the majority opinion that the national identity and the constitutional self-identity cannot be separated in Hungary.

The definition of the CC is a frame for interpretation to be used in the future to define the values which form identity. This frame is based on the reference to Article R) para. (3) of Fundamental Law.[46] Based on this, the CC is going to identify values that are the part of the constitutional identity referring to the National Avowal, the achievements the historical constitution, the provisions of the Fundamental Law and the purpose of these. In this regard, it is important to note that in the provisions of Article R) are obligatory for the interpretation of constitution, not only in the case of the constitutional identity but in every procedure regarding the interpretation of the Fundamental Law. Consequently, this reference does not help to get closer to the content of the constitutional identity.[47] The main problem of this approach is that it linked a hardly definable doctrine that is novel for the Hungarian constitutional system to an uncertain and recently used concept. One can add that there are more questions than answers regarding the achievements of historical constitution in the related literature and in the practice of the Constitutional Court.[48]

Furthermore, the argument reveals that Hungary's constitutional identity is not a system of static and close values. This is followed by a list of example values that belong to this circle. At this point, we have to note that

---

[46] Article R) para. (3) The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historic constitution.

[47] Regarding the questions related to Article R) para. (3), especially the achievements of historical constitution as reasoning standards, see: Imre Vörös, *A történeti alkotmány az Alkotmánybíróság gyakorlatában* [The historical constitution in the practice of the Constitutional Court], in (2016) 4 *Közjogi Szemle*, pp. 44-57.

[48] *Ibid*.; Attila Horváth, *Az alkotmányozáshoz. A magyar történeti alkotmány tradíciói* [For the Constitution-making. The tradition of the Hungarian historical constitution], in (2011) 1 *Alkotmánybírósági Szemle*; András Jakab, *Az Alaptörvény keletkezése és gyakorlati következményei*. [The creation of the Fundamental Law and its practical consequences], in (2011) HVG-ORAC, p. 198.

there is a dissonance between emphasizing of the unique nature of constitutional identity (standing implicitly on the ground of national identity) and the almost solely universal values present in the list.[49] This is most likely because in the example list the CC only included values that are beyond dispute, which are even though Hungarian and therefore their historical constitutional traditions are beyond dispute, do not bear the marks national identity. The root of the problem lies in the fact that according to the CC's previously discussed argument, all must respect Hungary's constitutional identity. This requirement, based on Article 4 TEU, applies to EU decision making mechanism on one hand, but at the same time it also applies to the highest national institutions of the Hungarian state. In our view, the CC could have solved the controversy mentioned above by unambiguously defining the two directions of identity protection, namely: the limit set up against the EU[50] in favor of the national identity protection of Member States, including the action taken against the *ultra vires* nature of EU legal acts; as well as the internal restriction in the constitutional system i.e. the protection against the actions of supreme governmental institutions. This would be an extraordinarily important distinction because the universal values listed, like "the division of powers" for example, could hardly be a reference basis in, for example, the argument based on Article 4 of EUT which implies the invocation of national identity, so something specifically unique and only concerning that particular nation. Nonetheless, we can't find any notion in the example list that would show a close relationship with national identity.[51] In the defense of the CC, solving this issue proves to be extraordinarily difficult: it would take the CC to undertake the definition of national identity beyond the scope of law. On the other hand, it can be stated that the universal values listed in the decision fall well within the Hungarian constitutional system and, according to the above argument, should be compulsorily respected by the government and parliament.

---

[49] "fundamental rights, the separation of powers, the republic as the form of the government, respect of autonomies in public law, freedom of religion, legally bound exercise of power, parliamentarianism, equality before law, acknowledgement of the judicial power, protection of the nationalities living with us".

[50] László Trócsányi, *Az alkotmányozás dilemmái* [The dilemmas of the constitution-making], in (2014) HVG-ORAC, p. 79.

[51] See Drinóczi, *op.cit., supra,* note 41. The decisions of the CJEU are about the nobiliary titles and using of languages, including the use of names.

According to the other essential statements of the reasoning, the identity formation values are not created only as declared by the Fundamental Law. Moreover, these values are in effect as long as Hungary is a sovereign country. These thoughts give place for different interpretations again. The denial of the static nature of values forming constitutional identity results in the conclusion that the identity formation elements are permanently. From this perspective, the Fundamental Law can contain only a snapshot of the elements of identity summarized by the "constituent generation".[52] According to another approach, the "personality of the Fundamental Law" is partly genetical, and partly added up by environmental capabilities. Consequently, the identity can be formed by the reactions to the environmental effects. In the light of the above the permanent change is natural.[53] This thought is in accordance with the reasoning of the CC what is based on the historical evolution of the constitution and the identity interpretation is closely related to the national identity. The difficulties start when the CC declares that the constitutional identity cannot be waived by way of an international treaty – Hungary can only be deprived of its constitutional identity through the final termination of its sovereignty, its independent statehood. Consequently, this statement defines the further attributes of the constitutional identity as a sum of eternal, unchangeable values which can also break away from the text of the Fundamental Law.[54] This part of the reasoning raises the question whether the values of the constitutional identity can be in contradiction with the future amendments to the constitution or even a new constitution? The abovementioned statement declares that the state can be deprived of these values only when it lost its sovereignty. Consequently, an amendment to the constitution or a new constitution cannot ignore these values even the sovereignty of the country remains intact. The CC attributed extraordinary importance to the concept of constitutional identity with this statement.

---

[52] Gary J. Jacobsohn, *Az alkotmányos identitás változásai* [The Changing of the Constitutional Identity], in (2013) 1 *Fundamentum*, pp. 1-7.

[53] Lóránt Csink, *Az Alaptörvény identitása – honnan hová?* [The identity of the Fundamental Law – From where into which direction?], in J. Tóth (ed.), *Tanulmányok Dr. Tóth Károly címzetes egyetemi tanár 70. születésnapjára.* [Essays in honour of the 70. birthday of honorary professor Károly Tóth] (2015) Tomus LXXVIII *Acta Universitais Szegediensis. Acta Juridica et Politica*, pp. 134-141.

[54] Decision 22/2016. (XII. 5.) CC [109].

The CC declares in the same paragraph that the sovereignty and the identity are closely connected to each other, so the two types of controls have to be examined with respect to each other. However, the reasoning does not contain the details of this connection and does not give a conceptual delimitation of the concepts. Because the identity and the sovereignty have many connection points it would be necessary to get a guidance interpretation in this regard from the CC. This question has special importance in the light of the approach as referring to the constitutional identity is in fact the more modern replacement of the principal of the sovereignty.[55] However, we have to see that the modern theory of the sovereignty has not been clear yet in the 21st century, prescribing of its content – similarly to identity - is excessively difficult mostly in the context of the international cooperation. According to some approaches of the related literature, in the global aspects of the sovereignty the national sovereignty is divided, so it can be unfolded in its joint exercise within the integration and in international cooperation.[56] Accordingly, it is not inconsequential in which relation are we speaking about identity and sovereignty and what kind of functions are associated to these.

Finally, the CC repeats its position regarding the e EUC Decision in question: "the joint exercise of powers under Article E) para. (2) of the Fundamental Law would violate human dignity, another fundamental right, the sovereignty of Hungary or its identity based on the country's historical constitution." We have already mentioned the undetermined relation of the secondary law of the EU with the constitutions of the Member States.[57] In relation with this problem we also cannot read a clear statement in the decision. The wording of "during the practice of its competence" does not specify the cases in which the CC will examine the EU law from the identity- or sovereignty control perspective. The other question that was not answered by the CC is the potential subjects of

[55] Trócsányi, *op.cit.*, *supra,* note 50, p. 72.: Furthermore, the concurring opinion of András Varga Zs. can be recalled which states that the protection of sovereignty of Hungary also means the protection of self-identity.

[56] Tímea Drinóczi, *Állami szuverenitás és párbeszéd* [National sovereignty and dialogue], in P. Takács (Ed.): *Az állam szuverenitása – eszmény és/vagy valóság.* [The sovereignty of the state. Idea and/or reality] (Budapest: Gondolat, 2015), p. 96.

[57] The Member States never gave up the priority of their legal system for the advantage of the EU law. See: Varga Zs., *op.cit., supra,* note 42.

examination, the acts of the EU that can be examined. The wording "joint exercise of competences based on the Article E) of the Fundamental Law" indicates an extraordinary wide frame which can include even the individual decisions of the EU organs, so we cannot specify what EU decisions will be examined by the CC in the future.

## 5. The Relevance of the Case

The CC was dealing for the first time in a majority decision with the doctrine of constitutional identity. The careful definition of the idea is new to the Hungarian public law and the clearing up of the related methods of constitutional interpretation were unfortunately adjourned. At the same time, the CC made multiple statements that might gain relevance in the future. In the future, the CC wishes to examine the idea of "constitutional identity" from the point of historical constitution and national identity - but for the success of this undertaking, the prudent clarification and convincing support of concepts and methodological frameworks will be unavoidable. Connecting of constitutional identity with the concept of sovereignty is less problematic, but even in this regard, there will be a need for the clarification of particular aspects of sovereignty. In the case of fundamental rights reservations, the more accurate formulation of arguments supporting such reservation is delayed.

It is still an open question, in the case which EU legal acts and procedures can the CC refer to the concepts above, as well as whether it recognizes values beyond the Fundamental Law, norm hierarchy within the Fundamental Law that could bound the constitution amending power as well in the future. Accordingly, it is possible that the CC opened[58] more questions than it answered.

### Appendix

The Seventh Amendment to the Fundamental Law (28th of June 2018) incorporated into the text of the constitution many of the statements previously experessed by the Constitutional Court in Decision 22/2016. (XII. 5.) CC. According to the amendments, (a) the National Awoval (the

[58] See: Nóra Chronowski, Attila Vincze, *Önazonosság és európai integráció – az Alkotmánybíróság az identitáskeresés útján* [Self-identity and European integration – the Constitutional Court on the way of identity-search], in (2017) 3 *Jogtudományi Közlönola.*

preamble) expresses that it is the fundamental duty of the state to protect the identity of the nation which is rooted in its historical constitution; (b) the new version of Article E) para. (2) of the Fundamental Law prescribes that the joint exercise of competences with the EU organs shall be in accordance with the fundamental rights and freedoms included in the Fundamental Law and may not limit the inalienable right of the country to rule its territorial integrity, its population and its form of government and the structure of state organs; (c) Article R) contains a new paragraph which prescribes that the protection of constitutional self-identity and of the Christian culture of the country is the duty of every state organ. Article XIV. of the Fundamental Law (which was not interpreted in detail, only mentioned by the CC in the above analysed decision) was also amended with provisions regarding the resettlement of foreigners, which is possible only based on individual claims.